Supreme Court, U.S.
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No. 051096

In The

Supreme Court of the United States

STUART T. GUTTMAN, M.D.,

Petitioner,

vs.

WILLIAM F. LANG, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the acceptance of *Ex-Parte Communications* repetitively is a Judicial act.

2. Whether a Judge accepting *Ex-Parte Communications* is subject to Prospective Immunity according to *Ex-Parte Young*, 209 U.S. 123 (1908).

3. Whether the Federal Court was correct in denying Prospective Injunctive Relief.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Stuart T. Guttman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is reproduced at (App. 9-10). The court of appeals opinion is reproduced at App. 1-8. The denial of En Banc Rehearing review is reproduced at App. 11.

JURISDICTION

The court of appeals entered its final judgment on January 26, 2006 and this petition is filed within 90 days of that date. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New Mexico State Statute Rule 21-300(7)(ii) is reproduced at App. 12-15.

STATEMENT OF THE CASE

Petitioner's case revolves around the acceptance of *Ex-Parte Communications* by a State Court Judge. Initially the first presiding Judge in the state court recused herself after receiving ***un-sealed*** Medical Records from Defendant Silverberg. These ***un-sealed*** records were then placed in the hands of the replacement Judge (Judge Lang). Petitioner then requested those records from both Judges and was denied access. Petitioner requested a contempt hearing involving Defendant Silverberg that was to be heard on September 22, 2004 for repetitively missing discovery deadlines. Prior to that hearing Defendant Silverberg sent an ***un-sealed*** E.K.G. to Judge Lang. Petitioner a double Board Certified physician was again denied access to this further ***un-sealed***, record. Thus Petitioner could not use this particular document for questioning during the contempt proceeding, which Defendant won.

As demonstrated the Appellant on pages (1, 13) of his Complaint quotes the use of injunctive relief according to *Ex-Parte Young*, 209 U.S. 123 (1980). The actual quote and statement from the initial complaint is as follows:

> "In the case of Judge Lang, if civil damages were not available certainly the injunctive relief provided by *Ex-Parte Young*, 209 U.S. 123 (1908) would be."

In fact *Ex Parte Young*, 209 U.S. 123 (1908) notes that where an ***act*** to be enforced is alleged to be unconstitutional if and only if that question is first raised in a Federal Court, that court has a right to decide it to the exclusion of all other courts.

The unconstitutional ***act*** Appellant has raised in his Initial Complaint consists of the following:

(a) Accepting ***un-sealed*** medical record from Defendant Silverberg prior to a Contempt of Court Proceeding. These records where not given to the Appellant upon request prior to the proceeding and after Judge Lang accepted them.

(b) Other ***un-sealed*** medical records had been sent to Judge Valerie Huling (the initial judge assigned to the case) that were then given to Judge Lang. Both Judges refused Appellant's request for these other ***un-sealed*** records.

It should be emphasized that these acts were part of the Appellant's Complaint when he filed his action in the United States Federal Court, and thus, was before the Tenth Circuit when they made their decision.

A further statement contained in the Appellant's brief also noted following:

In fact this opinion is reinforced in *Tompkins v. State of Florida*, in the Supreme Court of Florida (Case # SC 01-1619) wherein it is stated that a due process violation arising from *ex-parte* contact was not subject to harmless error analysis. Even in *Rushen v. Spain*, 464 U.S. 114 (1983) the Supreme Court there noted that *ex-parte communications* should be distributed to all parties. The court in *United States v. Microsoft Corp.*, 56 F. 3d 1448 (D.C. Cir. 1995) noted

that the appropriate act for a judge is to refuse all *ex-parte communications*. This opinion is further reinforced by the following citations utilized in the Plaintiff's Opening Brief: *Hathcock v. Navistar, Int'l Transp. Corp.*, 53 F. 3d 36, 41 (4th Cir. 1995) (Judge required to recuse himself on remand due to *ex-parte* submissions); *United States v. Furst*, 886 F. 2d 558, 582 (3rd Cir. 1989) (Judge required to recuse himself from sentencing based on *ex-parte communications* with counsel), cert. denied, 493 U.S. 1062 (1990); *Buckely v. Snapper Power Equip. Co.*, 813 P. 2d 125, 128, 129 (Wash. Ct. App.) (Judge required to recuse himself due to *ex-parte communications* with guardian ad litem and counsel), review denied, 833 P. 2d 287 (Wash. 1991).

The extreme importance of the issue of *ex-parte communication* cannot and should not have been overlooked. The statement in the instant decision about *ex-parte communication* (even if accepted) not rendering the ***act*** non-judicial isn't supported in the legal literature or even the Standard of Judicial Ethics. To show the importance of such an ***act*** in terms of ethics is the fact that both *State and Federal Codes of Judicial Ethics* prohibit *ex-parte communications. See* Model Code of Judicial Conduct Cannon 3(B)(7) (1990); Code of Conduct for Federal Judges Cannon 3(A)(B). 175 F.R.D. 364, 367 (1998). On page seventeen (17) of Appellant's Opening brief is the following exact quote:

> "It is to be noted that even the Local Rules of Judicial Conduct have a bearing on this case. As noted per the present litigation (*See*, page 8 of the Initial Compliant) is enumerated the following. Rule 21-300(7)(ii), that States a Judge shall not initiate, permit or Consider *ex-parte communication.*"

Appellant on page seventeen (17) of his Opening brief even quoted the Local Code of Judicial Conduct Section 21-300(7)(ii) where is the following:

> "The judge makes provisions promptly to notify all other parties of the substance of *ex-parte communication* if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage."

This is exactly the situation in the State Court where Defendant Silverberg was utilizing an excuse per his Medical Record for having missed discovery deadlines. Thus, prior to Contempt of Court proceeding an ***un-sealed*** record was sent to Judge Lang, but both the Defendant and the Judge Lang refused Appellant's access to the document (especially considering Appellant is a double Board-Certified Physician *in Internal Medicine and Pulmonary Medicine).*

Defendant Silverberg with thirty years legal practice (his statement) had to have known I had a full right to any ***un-sealed*** document sent to a State Court Judge in order to gain an ***unfair advantage***. Obviously the ***un-sealed*** record was utilized in Judge Lang's decision to not grant contempt of court to Defendant Silverberg. Appellant notes this was in his *Initial Complaint.*

In *Pulliam v. Allen*, 454 U.S. 522 (1984):

> "The court held that the doctrine of judicial immunity does not preclude injunctive relief as opposed to money damages against a judicial officer acting in judicial capacity."

It can be stated that both *Forrester v. White*, 44 U.S. 219, 108 S. Ct. 538 (1988) and *Pulliam v. Allen*, have made

it quite clear that absolute judicial immunity is not alive in American Jurisprudence. The citation of *Pulliam v. Allen*, has the following applicable quote to the present case:

> "There is no support for a conclusion that Congress intended to limit the injunctive relief available under 1983 in a way that would prevent federal injunctive relief against a state judge, rather, Congress intended 1983 to be an independent protection for federal rights, and there is nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from Federal collateral review. Pp. 536-543."

Reversing the District and the 7th Circuit Court of Appeals, *Forrester*, like *Pulliam*, make it quite clear that absolute judicial immunity is in a sense dead in American Jurisprudence.

REASONS FOR GRANTING THE WRIT

The citation of *Stump v. Sparkman*, 435 U.S. 349 (1978), has suggested that determining whether an act by a judge has immunity is determined by whether the act itself is Judicial and whether the court in such an act has jurisdiction. The United States Supreme Court in *Forrester v. White*, 44 U.S. 219, 108 S. Ct. 538 (1988), following a writ of certiorari, reversed a judgment granting absolute immunity to a judge who fired a probation officer. Justice O'Connor noted in her opinion that the court "has been quite sparing in its recognition of claims to absolute immunity." 44 U.S. at 224. It was held that the actions of

Judge White even negated the application of quasi-judicial immunity. In *Pulliam v. Allen*, 456 U.S. 522 (1984), the court held that judicial immunity does not bar an award of attorney fees against a judge when Plaintiff wins a suit for injunctive or declaratory relief. In *Pulliam*, the U.S. Supreme Court ruled that a magistrate was liable for over $80,000.00 in legal fees even though her actions were indisputable judicial acts within her subject matter jurisdiction. The court in *Pulliam* noted that the doctrine of Judicial immunity does not preclude injunctive relief as opposed to money damages against a judicial officer acting in her judicial capacity. The Tenth Circuit in the present case noted in their decision that Judge Lang was not absolutely immune from a suit for Prospective Injunctive Relief citing *Mireles v. Waco*, 502 U.S. 9, n.1 (1991). But then the court went on to state that any injunctive relief that would address his complaint pertains to past conduct and is not prospective. Petitioner notes that in fact he did request Prospective Injunctive Relief according to the doctrine of *Ex-Parte Young*. This is noted in the appendix section of this brief, where an attached copy of his initial complaint can be found.

Furthermore, the Tenth Circuit has stated that whether or not Judge Lang accepted *Ex-Parte Communications*, was biased against the Petitioner or should have recused himself does not abrogate the immunity or render his acts non-judicial.

However, the decision of the Tenth Circuit in the present case seems to go against the very core of how the U.S. Supreme Court evaluates whether an act is judicial. The U.S. Supreme Court has explained that courts should focus on the "nature" and "function" of an act when deciding whether certain actions were taken in a judge's judicial